

October 15, 1999

Tom Russi
Christine Paul

Re: Attempted Disclosure of Government Record
While OIP Opinion Was Pending

Dear Mr. Russi and Ms. Paul:

This is in response to your letter to the Office of Information Practices ("OIP") dated April 5, 1999, for an opinion on the above-referenced matter.

ISSUE PRESENTED

Whether Senator Andrew Levin violated section 84-12, Hawaii Revised Statutes, when, after obtaining a copy of a contract under section 92F-19, Hawaii Revised Statutes, he attempted to disclose it to you.

BRIEF ANSWER

There was no violation of chapter 92F, Hawaii Revised Statutes, because Senator Levin attempted to disclose information that is not protected from disclosure. The OIP cannot opine on whether Senator Levin violated chapter 84, Hawaii Revised Statutes, as it is outside the scope of the OIP's jurisdiction.

FACTS

In 1996, you made several record requests to Kona Community Hospital ("KCH") for the eligible charges and inpatient contracts between KCH and several companies. You were not able to obtain access to the records. You asked the OIP for an opinion on whether the information you requested was public. The scope of this request was eventually narrowed to the issue of whether the eligible charges

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for the 1995 and 1996 inpatient contracts between KCH and Hawaii Medical Service Association ("HMSA"), are public, and whether the eligible charges in the 1996 inpatient contract between KCH and Hawaii Management Alliance Association ("HMAA") are public.

In stating its position to the OIP, KCH did not argue that disclosure of the eligible charges would cause the frustration of a legitimate government function. However, HMSA argued that its eligible charges were "proprietary financial and commercial information," and HMAA argued that its eligible charges were "confidential business information." OIP Op. Ltr. No. 98-2 at 5 (Apr. 24, 1998). You presented an argument that they were public.

Based on my conversations with you, and on the facts as stated in the Hawaii State Ethics Commission Informal Advisory Opinions Number 99-1 and 99-2, copies of which were sent to the OIP by you, other relevant facts appear to be as follows. While the OIP Opinion Letter Number 98-2 was still being drafted, you had discussions on 1998 Senate Concurrent Resolution ("SCR") 46 with Senator Levin. SCR 46, if passed, would have required the State Auditor to investigate the eligible charges and other aspects of the payment schemes used by HMSA, to determine whether such charges were fair.

Senator Levin requested, and was given, a copy of the KCH contract with HMSA, which contained the eligible charge information you sought. On March 31, 1998, you were at Senator Levin's office. Upon instruction from the Senator, his legislative aide, Jacob Kowalski, attempted to give you a copy of the KCH contract with HMSA. You refused to take the copy. Based on this incident, you now ask whether Senator Levin violated section 84-12, Hawaii Revised Statutes, by obtaining a copy of the contract under section 92F-19, Hawaii Revised Statutes, and then attempting to give a copy to you.

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On April 24, 1998, the OIP issued the OIP Opinion Letter Number 98-2, which opined that the eligible charges for the 1996 inpatient contracts with KCH are public.¹

DISCUSSION

I. THE UIPA AND LIMITATIONS ON DISCLOSURE

At this time, it is appropriate to reiterate parts of pages 2 and 3 of the letter I wrote to you dated March 24, 1999 (copy enclosed), as it applies to this discussion. A government record usually falls into one of three categories: public in its entirety, partially public but subject to segregation of portions that are not public, or not public in its entirety. There are also circumstances when a record may be confidential, but later on becomes public, either in whole or in part, because for that particular record, the exception to disclosure is a temporal one. The eligible charges that you requested were not deemed by the OIP to be confidential at one point in time, and later deemed public.

Government agencies sometimes are not sure whether a record that has been requested is public. In these instances, the agency, or the requester seeking access, may request an opinion from the OIP. In drafting our opinions, we follow section 92F-11(a), Hawaii Revised Statutes, which mandates that all government records be open to public inspection unless access is restricted or closed by law.

The Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), lists five exceptions to this general rule of disclosure.

¹ Based on correspondence between you and OIP Staff Attorney Jennifer Chock, a separate OIP file was opened on the issue of whether you were entitled to access inpatient contracts that Hawaii Health Systems Corporation ("HHSC") executed with HMSA, Hawaii Dental Service, the Kaiser Foundation Health Plan, and HMAA on behalf of the twelve Community Hospitals (see enclosed copy of letter to Tom Russi of August 21, 1997, from Jennifer Chock). In addition, in a letter to Jennifer Chock dated May 11, 1998 (also enclosed), you requested all eligible charges for the Community Hospitals with HMSA from 1995 to present, and with HMAA from 1996 to present. On July 30, 1998, Alice Hall of HHSC, provided you with copies of the "DRG" schedules for the HMSA contracts from 1995 to May 12, 1998, for four of the Community Hospitals. Ms. Hall's letter indicated that the information from the remaining Community Hospitals would be available in a few weeks (see enclosed copy of letter to you from Alice Hall dated July 30, 1998). In a telephone conversation with you on October 11, 1999, you confirmed that all the contracts and eligible charge information you requested had been disclosed.

Government agencies are not required to disclose: (1) information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) information pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the state or any county is or may be a party, but only to the extent such records would not be discoverable; (3) information which, if disclosed, would cause the frustration of a legitimate government function; (4) information that is protected by a state or federal law or court order; and (5) certain legislative papers. Haw. Rev. Stat. §92F-13 (1993).

When a requested record falls into one of these exceptions, an agency is not required to disclose it, but an agency is not forbidden from waiving the exception and disclosing the record, unless exception (4) applies and the record is protected by a statute or court order. Sometimes after a request has been made for an OIP opinion, but before the opinion is issued, an agency changes its position and voluntarily discloses all or part of the requested record. The fact that an agency may choose not to disclose a record while an OIP opinion is pending does not mean the record is confidential until the OIP decides otherwise. The status of a record as confidential or public does not hinge on the fact that the OIP has not yet opined on it, it depends on the *content* of the record - which does not change.

While the OIP ultimately opined that the eligible charges were indeed public, this does not mean that they were confidential while your request was pending with the OIP. It means that the public nature of the information was at issue. The KCH could have chosen at any time to make the eligible charges public without violating the UIPA. The eligible charges were deemed public by the OIP in OIP Opinion Letter Number 98-2. Therefore, the eligible charges were always public, even while the issue was pending before the OIP.

Senator Levin obtained a copy of the contract while the OIP's opinion was still pending, and it appears that he obtained this copy pursuant to section 92F-19, Hawaii Revised Statutes. Section 92F-19, Hawaii Revised Statutes, provides:

§92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

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(6) To the legislature, or a county council, or any committee or subcommittee thereof;

...

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

Haw. Rev. Stat. §92F-19(a)(6) (1993).

The OIP is of the opinion that the eligible charges were always public.² Therefore, the fact that Senator Levin obtained a copy of the contract under section 92F-19, Hawaii Revised Statutes, is not relevant to the issue here. Senator Levin could not have violated the confidentiality provision in section 92F-19(b), Hawaii Revised Statutes, because the eligible charges were not then, and are not now, protected from disclosure under the UIPA. As you stated in our telephone conversation of October 11, 1999, Hawaii Health Systems Corporation ("HHSC") ultimately disclosed all the contracts and eligible charge information you requested. Therefore, the issue of whether the entire contract Senator Levin obtained was public is moot, as HHSC waived any exceptions to disclosure under section 92F-13, Hawaii Revised Statutes, when it disclosed that information to you.

II. PENALTIES UNDER THE UIPA

Even if Senator Levin had disclosed a government record to you, he would not have been criminally liable under section 92F-17, Hawaii Revised Statutes, which provides:

§92F-17 Criminal Penalties. (a) An officer or employee who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any

² Legal research by the OIP did not uncover any State or federal cases opining that a requested record is confidential while the issue of its public nature is pending before a freedom of information office.

person or agency with actual knowledge that disclosure is prohibited, shall be guilty of a misdemeanor, unless a greater penalty is otherwise provided by law.

Haw. Rev. Stat. §92F-17(a) (1993). In drafting the OIP Opinion Letter Number 98-2, the OIP was unable to find any confidentiality statute that explicitly protected eligible charges from disclosure. Senator Levin therefore attempted to disclose information that is not protected by an express confidentiality statute. He was not in violation of section 92F-17, Hawaii Revised Statutes, for two reasons: (1) no disclosure occurred, and (2) the information was not explicitly protected by a confidentiality statute. Because the eligible charges are not protected by a specific confidentiality statute, Senator Levin would not have been subject to criminal penalties had the disclosure actually occurred.

Further, there are no provisions in the UIPA that address attempted disclosures of allegedly protected information when disclosure never actually occurs, nor does the UIPA impose civil liabilities for attempted disclosures. Finally, section 92F-15, Hawaii Revised Statutes, allows members of the public to sue for access when access to government records has been denied, but this section does not appear to entitle members of the public to a cause of action for attempted disclosures.

III. THE HAWAII CODE OF ETHICS

The Hawaii Code of Ethics provides:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

Haw. Rev. Stat. §84-12 (1993).

The OIP does not have jurisdiction to opine on whether Senator Levin violated the section 84-12, Hawaii Revised Statutes. See Haw. Rev. Stat.

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§92F-42 (Supp. 1998) (powers and duties of the OIP). The Hawaii State Ethics Commission is the government agency charged with interpreting chapter 84, Hawaii Revised Statutes. See Haw. Rev. Stat. §84-31 (Supp. 1998).

CONCLUSION

Senator Levin's attempt, while an OIP opinion was pending, to give you a copy of the KCH contract with HMSA that contained the eligible charge information you sought access to, did not violate the UIPA.

Very truly yours,

Carlotta M. Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD:ran

cc: Honorable Andrew Levin, Senator
Honorable Daniel J. Mollway, Executive Director,
Hawaii State Ethics Commission

Enclosures (4)